82-2024

No.

Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOHN EARLY and STEPHEN EARLY,
Petitioners,

v.

EASTERN TRANSFER, and FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN AND PACKERS, TEAMSTERS LOCAL 82, *et al.*,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The First Circuit

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June 10, 1983

QUESTION PRESENTED

Do union representatives who sit on joint union employer grievance committees that pass on employee grievances at steps in the grievance procedure short of impartial arbitration owe the grievant a duty of fair representation?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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JOHN EARLY and STEPHEN EARLY,
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v.

EASTERN TRANSFER, and FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN AND PACKERS, TEAMSTERS LOCAL 82, *et al.*,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The First Circuit

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OPINIONS BELOW

The memorandum opinion and order of the district court (Appendix A, *infra,* pp. A-1 to A-5) is not officially reported. The opinion of the court of appeals (Appendix B, *infra,* pp. B-1 to B-15) is reported at 699 F.2d 552.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1983. Justice Brennan signed an order on April 21, 1983, extending the time in which to file this peti-

tion to and including June 11, 1983. The Court has jurisdiction to review the court of appeals' decision pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jursidiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Facts

Although the facts are largely undisputed, because this action was dismissed on defendants' motions for summary judgment, the plaintiffs-petitioners' version of the facts must be accepted as true.

Petitioners John Early and his son, Stephen Early, worked for respondent Eastern Transfer (''Eastern''), a moving and storage company, from 1975 until their discharge on June 7, 1981. Prior to their discharges, both men had been assigned to jobs at the Hynes Auditorium helping to set up a trade show. On Friday, June 5th, both men were orally informed that they were to report to the Auditorium at 11 a.m. on Saturday and at 6 a.m. on Sun-

day. They reported as scheduled on Saturday and worked until 8:30 p.m., when they reported to the office, told their immediate supervisor, James McCullough, that they were leaving, punched the time clock, and left. In fact, John Early was ill at the time he left.

Previously, whenever McCullough needed his men to work overtime, he would tell them to remain on the job; otherwise he would acknowledge their departure with a "good bye." On this particular occasion, McCullough responded to John Early's remark as he and Stephen departed by saying, "See you at 6:00." Although Eastern's president, John Sheehan, was also present when petitioners said good bye to McCullough, he said nothing to them. However, when Eastern's general manager returned to the Auditorium later in the evening and learned that petitioners had left work, he decided to fire them.[1] And, when petitioners reported for work the next morning, they were both given discharge notices for "leaving the job before completion of work assigned on Saturday P.M. at Hynes Auditorium."[2]

Petitioners reported their discharges to Bart Griffiths, their union business agent who also served as the principal officer (secretary-treasurer) of their union, respondent Teamsters Local 82. Pursuant to the grievance procedure in the collective bargaining agreement between Local 82

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[1]Without any reference to record evidence, the lower courts stated in their opinions that the Earlys left work without permission. App. A-1, B-2. This "finding" is unsupportable given the fact that the petitioners were normally instructed to remain, or given tacit permission to leave, by McCullough who was informed of, and did not object to their departure. At the very least, the question whether petitioners had permission to leave was disputed and should not have been resolved in a summary judgment proceeding.

[2]Eastern asserted that petitioners had been placed on notice that Saturday, June 6th "Will Be A Long Day" by virtue of a job assignment sheet posted Friday evening. However, neither petitioners saw the sheet. John Early testified that it had not yet been posted when he left work on Friday at 4:30 p.m., and Stephen Early testified that he was on vacation on Friday and received his job assignment by telephone.

and Eastern (Appendix C), Griffiths scheduled a meeting with company personnel to discuss the matter. Messrs. Sheehan and Epstein appeared for the company and refused to modify their discipline of the two petitioners. Petitioners then prepared a written grievance, and a hearing was scheduled for July 23, 1981, before a joint grievance committee comprised of two union and two employer representatives.

One of the two union representatives on the joint committee which heard the grievances was George Harris, the president or second-ranking officer of Local 82. Petitioners were concerned about Harris' impartiality because they were members of a dissident group which advocated certain reforms of both their Local and International Unions, which had run an opposition slate against Griffiths and Harris, and which had recently prevailed in a politically embarrassing lawsuit against the Local, Griffiths, and Harris.[3] Indeed, both petitioners had signed petitions presented to Griffiths and Harris, and had spoken out in opposition to the incumbent officers' policies during union meetings. In addition, John Early had declined to appear as witnesses on behalf of the officers during the trial. Given the fact that Griffiths was going to present their grievance, and Harris was going to be one of the judges considering it, petitioners were obviously concerned that the deck would be stacked against them.

Prior to the hearing, John Early made repeated attempts to discuss his grievance with Griffiths who returned only one of more than a dozen telephone calls. When Early did reach Griffiths, he requested his business agent to obtain from the company the time cards of other employees which could be used to demonstrate that other employees also routinely left their jobs at the end of a normal work day, but Griffiths did not obtain the time cards

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[3] *Crowley, et al. v. Local No. 82, et al.*, 521 F. Supp. 614 (D.Mass. 1981), *aff'd*, 679 F.2d 978 (1st Cir. 1982), *cert. granted*, 51 U.S.L.W. 3545 (1983).

until the outset of the hearing. In addition, Griffiths failed to argue that the contract referred to mandatory overtime only during the Monday-to-Friday workweek, that it required that notice be given of weekend assignments, including overtime, and that it gave employees the right to decline to work on weekends. Nonetheless, when the union chairman of the committee asked the Earlys at the conclusion of the hearing, but before a decision had been rendered, whether they had been properly represented, they replied in the affirmative so as not to offend the committee members. App. B-12, n. 8.

Despite the relatively weak defense put forth by Griffiths, petitioners had reason to be optimistic that the harsh penalty of discharge would not stand, given the circumstances of their case. They had worked a full day and into the evening hours and were scheduled to report the next morning at 6:00 a.m.; they left with the apparent consent of the supervisor who was normally authorized to grant or withhold permission to leave; John Early had been ill at the time he left; and the contract explicitly prohibited discharges without a prior warning which neither had received (App. A-4, B-7). However, the committee denied petitioners' grievances without giving any reasons. In doing so, the committee effectively found that petitioners' conduct was not contractually protected and upheld Eastern's decision to apply the maximum penalty — discharge. App. B-2.

Given the numerical composition of the committee — an equal number of employer and union representatives and no tie-breaker — the company could not have obtained a majority unless at least one of the Teamster representatives voted with the employer representatives to deny the Earlys' grievances. On the other hand, had Local 82 president George Harris, and the Local's other representative on the committee voted to sustain petitioners' grievances, the committee would have deadlocked, and the grievances would have proceeded automatically to the next, and final

step in the contract grievance procedure, arbitration by an impartial umpire. App. B-2, n. 1; App. C, Step 4.

B. The Decisions Below

Petitioners filed a timely suit in the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1336, and 29 U.S.C. §§ 157, 159, 185(a), and 412. They alleged that they had been wrongfully discharged by respondent Eastern in violation of their contract and that respondent Local 82 had breached its duty of fair representation in connection with the joint committee proceeding which had upheld the discharges. Specifically, they alleged that Griffiths had failed to present their case adequately and that Harris had improperly sided with Eastern as a result of petitioners'"dissident" union activities.

Their action was dismissed by the district court on respondents' motions for summary judgment. The court found that petitioners had failed to raise genuine issues of material fact with respect to the union's representing them fairly in handling their grievance. "Plaintiffs have suggested a motive for their union's acting arbitrarily or using less than its best efforts on their behalf; but they have offered insufficient evidence of conduct or omissions to support an inference of the union's breach of its statutory duty." App. A-2. Although petitioners had also argued that the joint committee decisional process was tainted by bias and that the union members on the committee breached their duty of fair representation, the district court dismissed this argument because"it finds support in two law review articles but not in any relevant precedents." App. A-5, n. 1.

The court of appeals affirmed. Concerning Griffiths' presentation of petitioners' grievance, the court observed that"the Earlys' submissions, viewed most favorably, created an issue of fact at least as to whether Griffiths had

reason to be hostile to them." App. B-5. However, the court reviewed the record and noted that Griffiths had presented to the joint grievance committee most of the relevant facts and arguments, and that petitioners themselves had been allowed to supplement the arguments made to the joint committee. App. B-7. Under the circumstances, the court concluded that "plaintiffs had failed to demonstrate the existence of a material issue of fact with regard to whether Griffiths's conduct amounted to unfair representation." App. B-9. Petitioners do not contend that, standing alone, the propriety of this ruling would be worthy of review by this Court.

The court of appeals also rejected petitioners' argument that the district court should have scrutinized the conduct of the union members of the joint committee which denied their grievances. Petitioners had argued that Teamster representatives who sit on joint committees play a critical role in handling their members' grievances and accordingly owe those members a duty of fair representation. Unless the duty of fair representation is extended to these individuals, petitioners argued, the Teamsters Union would have a virtual immunity from liability to its members for arbitrary and even bad faith conduct when deciding to abandon grievances, by voting with management to deny grievances, short of impartial arbitration.

Although noting that "[a] few courts and commentators have expressed similar concerns, which we do not say are frivolous," App. B-13, the First Circuit declined to accept this argument for two reasons. First, since the collective bargaining agreement declared that joint committee decisions were to be "final and binding" upon the parties, treating committee decisions merely as determinations whether to process grievances to arbitration, rather than as the functional equivalent of arbitration, would "alter the character of the joint committee from that contemplated in the collective bargaining agreement." App. B-13. Second, the court stated that this Court had "con-

sistently treated the decisions of joint committees and of arbitrators identically." *Ibid.* Accordingly, the court concluded that

> Without any indication from either the Supreme Court or the collective bargaining agreement that a joint committee is to be perceived differently from an arbitrator, we cannot impose a duty of partiality on the members of such an adjudicatory body.

App. B-14.[4]

REASONS FOR GRANTING THE WRIT

The Petition Presents An Important Issue of Law Which This Court Should Decide.

A. The Joint Committee

Although Teamster joint grievance committees have figured in several of this Court's decisions under § 301 of the Labor Management Relations Act, so far as we are

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[4]The court also rejected petitioners' argument that Harris' bias as a member of the joint committee violated the duty of fair representation for another reason. The court reasoned that because "[a]ll the facts . . . argued as to Harris's alleged bias were known to the Earlys at the time the joint committee heard their grievances," they waived their right to object by their failure to raise the issue of bias before the hearing, even though to do so would have risked alienating the committee about to hear their grievances. App. B-10 thru B-12.

It is one thing to require a *union* to fulfill its role as an advocate and to challenge the impartiality of an arbitrator before a hearing has begun; it is an altogether different matter to require an employee to accuse his own union of prejudice while the union's representatives are still representing him and sitting on his case. The employee knows full well that his union controls the grievance machinery and that he is at its mercy. Thus, to require an employee to openly accuse his own union representatives of bias before they perform their representative function is to insure that they will not do so and is tantamount to requiring the grievant to commit economic suicide.

aware, no party has ever urged the Court to distinguish between the role of union representatives on joint committees, and the role of impartial arbitrators in the grievance adjustment process. Certainly, the Court's decisions have never addressed the question whether there is any legally significant difference between the two. Yet, the lower courts have, as did the courts below, construed the Court's silence as the equivalent of an affirmation that the two processes are legally identical. This petition presents the Court with an opportunity to decide whether the two forms of grievance machinery are identical, or whether, as petitioners would show, joint committee hearings are analogous not to impartial arbitrations, but to pre-arbitral negotiations between employers and unions under standard grievance resolution procedures. From the individual employee's perspective, the distinction is critical, since if the two processes are treated the same, the individual employee is unprotected by the duty of fair representation.

The role played by most unions in arbitral proceedings under collective bargaining agreements is that of a representative or advocate. If the union believes that a member's grievance is meritorious, it will process the grievance through each step of the grievance process until it can obtain a satisfactory resolution. Ultimately, if it cannot obtain a satisfactory adjustment, the union will normally submit the grievance to impartial arbitration.

The role played by the Teamsters Union is quite different in that it acts both as prosecutor and judge of its members' grievances. There is no question that the duty of fair representation permits all unions to sift out, and decline to arbitrate, unmeritorious grievances. However, when other unions abandon a member's grievance, the union's reasons for doing so are subject to review in a suit alleging that it breached the duty of fair representation.[5]

The genius of the Teamster procedure is that the union

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[5] *See Vaca v. Sipes*, 386 U.S. 171 (1967).

presents practically every grievance to a joint committee. Accordingly, discretion to sift out unmeritorious grievances is exercised not by the local business agent who "presents" the grievance, but by the union representatives who sit on the committees which are comprised of an equal number of union and employer representatives and act only by majority vote. Thus, whenever a member's grievance is denied, the Union representatives must have voted to deny the grievance; had they voted to sustain it, the committee would have deadlocked unless, of course, the employer representatives voted to sustain the grievance as well. Deadlocked grievances are automaticaly referred to the next step in the grievance procedure which, in this case, would have been impartial arbitration.

Therefore, the only way the Teamsters Union can abandon a grievance short of arbitration is for its representatives on a joint committee to vote to deny the grievance. Of equal importance, if the joint committee denies a grievance, no reason is given for the decision, and hence there is nothing which can be reviewed in an action to vacate the decision.[6] The Teamsters Union has been successful, thus far, in cloaking the actions of its representatives on joint committees with the same degree of judicial deference which normally is accorded to impartial arbitrators.[7] But joint committees are not arbitrators, and by parading themselves as such, they simply give arbitration a bad name.[8]

[6] *See, e.g., Stephenson v. NLRB*, 550 F.2d 535 (9th Cir. 1977); *Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974).

[7] *See, e.g., Yates v. Yellow Freight System*, 501 F.Supp. 101, 105 (S.D.Oh. 1980)(union representatives on joint committees cloaked with judicial immunity).

[8] *See* Remarks of Robert Coulson, president of the Am. Arbitration Ass'n, 107 LRRM 147 (June 2, 1981): "The joint grievance committee system of arbitration found in Teamster contracts is so clearly defective as an impartial mechanism that it is not surprising that we keep seeing it tested in the courts."

In fact, the Teamsters Union represents only 9 percent of the unionized workers in the private sector. *Directory of National Unions*, U.S. Dept. of

B. Joint Committee Decisions Should Not Be Treated The Same As Decisions By Impartial Arbitrators.

In the decisions below, the courts held that Teamster representatives sitting on joint committees effectively owe their members no duty of fair representation at all when they vote to deny a grievance. This conclusion is of great significance to the nearly 2 million Teamster members, most of whom are covered by collective bargaining agreements which provide for the submission of grievances to joint committees. By way of contrast, when other unions decide not to process a grievance, the member is not faced with what is labelled an arbitral award to which the court is asked to defer pursuant to *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). However, when the Teamsters Union decides not to back one of its member's grievances, the member is invariably faced with an award which is labelled by his union and employer as "final and binding." Unfortunately, the federal courts have attributed a talismanic significance to this language by treating "awards" by joint committees comprised of "interested" parties as the functional equivalent of decisions by impartial arbitrators entitled to deference pursuant to this Court's decision in *Enterprise Wheel.*

As a practical matter, dismissal of a Teamster's grievance by a joint union-employer committee is not the equivalent of disposition by a single impartial arbitrator, or by an arbitral tribunal headed by a neutral, third party. In fact, an adverse joint committee decision is no more, nor less, than a decision by the Teamster's own union representatives, who happen to be sitting on the committee, to abandon the member's grievance short of arbitra-

Labor, Bureau of Labor Statistics, 1979. However, between 1977 and mid-1980, 27 percent of all reported federal court decisions in hybrid section 301/duty of fair representation cases were brought by Teamsters. Unpublished law review article by Professor Michael J. Goldberg.

tion. This feature of the joint committee process has prompted Professor David Feller to observe:

> A decision by a joint committee that a grievance lacks merit, which has been analogized to an arbitrator's award, is thus simply an agreement by the union that management did not violate the agreement.
>
> * * *
>
> [I]nsofar as an individual claim is concerned, a decision of a joint committee that his grievance lacks merit should bind him just as much, but no more, than a decision reached at the third or fourth step of a grievance procedure that the grievance should be abandoned [short of arbitration].

Feller, *A General Theory of the Collective Bargaining Agreement,* 61 Calif. L. Rev. 663, 837-38 (1973).

By conferring the same deference upon joint committee awards as they do upon arbitral decisions, the courts are effectively refusing to scrutinize the critical union conduct in Teamster grievance processing. The result is that, contrary to the Court's teachings in *Vaca v. Sipes,* 386 U.S. 171 (1967), and *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976), the Teamsters Union is practically immune from any liability to its two million members for breaches of the duty of fair representation. As one commentator has observed, the committee system has become

> a tool for disciplining union members. The system is designed to maximize and exploit the opportunities for horesetrading and collusion between the employer and the union.

Azoff, *Joint Committees As An Alternative Form of Arbitration Under the NLRA,* 47 Tul. L. Rev. 325, 336 (1973).

The federal judiciary, including the courts below and others, have recognized the defects of the Teamster joint committee process. For example, the Eighth Circuit has noted that the process is

> subject to grave abuses, including, notably, collusive secret agreements between employers and unions as a result of which the interests of individual employee grievants may be sacrificed.... * * * In that situation the interests of the individual grievant may be ignored on the basis of a collusive side agreement between management and the labor union that owes to the grievant a duty of fair representation.

I.H. Whitehouse & Sons v. Local Union 214, 621 F.2d 294, 299 (8th Cir. 1980). *See also Barrentine v. Arkansas-Best Freight, Inc.,* 615 F.2d 1194, 1201-02 (8th Cir. 1980), *rev'd on other grounds,* 450 U.S. 728 (1981). Nonetheless, even these courts have considered themselves bound by various decisions of this Court to accord joint committee awards the same degree of respect and finality normally reserved for reasoned opinions issued by impartial arbitrators. However, the precise question presented here has never been decided by this Court.[9]

Most lower courts have cited *General Drivers v. Riss & Co.,* 372 U.S. 517 (1963), when holding that joint committees awards are entitled to the same judicial deference normally given to arbitral decisions. We respectfully submit

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[9] *See, e.g., United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56 (1981)(appropriate statute of limitations for vacating arbitral decision in section 301 suit); *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1981)(union may not contractually limit employees' rights under Fair Labor Standards Act); *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554 (1975)(arbitral award is vitiated by union breach of duty of fair representation and will not insulate employer from liability for breach of contract); *Humphrey v. Moore,* 375 U.S. 335 (1964)(duty of fair representation is not violated by union effort to dovetail seniority lists of merged companies).

that such reliance is misplaced. *Riss* was an action by a Teamsters Local to compel an employer to honor a joint committee award. When rejecting the employer's defense that the absence of a neutral, third party rendered such awards non-binding, this Court merely held that an employer could no more repudiate a contractual agreement to be bound by a joint committee decision than it could repudiate an agreement to be bound by an arbitral decision. As the Court subsequently explained, a joint committee award is "final and binding on the parties, just as the contract says it is." *Humphrey v. Moore,* 375 U.S. 335, 351 (1964).

This is not to say, however, that the courts may not examine the conduct of the union committee representatives who vote to deny individuals' grievances. Nor is it to say that joint committee awards should not be set aside pursuant to *Hines* in those cases where the union's conduct, either in presenting a grievance, or in deciding to "deny" the grievance, violated its duty of fair representation. Yet, that is how the federal courts, including those below, routinely apply *Riss.* The effect is to deny Teamsters the opportunity to prove that they have been the victims of union breaches of the duty of fair representation. Since the union has its members sit on the joint committees, judicial scrutiny must also focus upon the union's conduct in its role as the "adjudicator," as well as the prosecutor, of its members' grievances. To foreclose consideration of this other, and most critical aspect of the union's grievance-processing role is to confer a judicial immunity upon the Teamsters Union and to deny its members the protection of the duty of fair representation that this Court has so carefully fashioned over the years to serve as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes, supra,* 386 U.S. at 182.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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June 10, 1983

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN EARLY and STEPHEN EARLY, Plaintiffs,	:	
	:	CIVIL ACTION
v.	:	NO. 81-2102-G
EASTERN TRANSFER, JOHN C. SHEEHAN, President, et al., Defendants.	:	

MEMORANDUM AND ORDER FOR
SUMMARY JUDGEMENT FOR DEFENDANTS
January 29, 1982

GARRITY, J.

This is a wrongful discharge suit brought by plaintiffs, father and son, against their employer and union, under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging that plaintiffs were discharged in violation of the applicable collective bargaining agreement and that the union breached its duty of fair representation in processing plaintiffs' grievance. The three principal parties — plaintiffs, employer, and union — filed crossmotions for summary judgement, supported by numerous affidavits and legal memoranda. We heard oral argument on January 25, 1982. After having read all of the relevant filings, we order that plaintiffs' motion for summary judgement be denied and defendants' motions be granted and that summary judgement be entered dismissing the complaint.

Plaintiffs, as employees of defendant Eastern Transfer, were working at Hynes Auditorium on the weekend beginning Saturday, June 6, 1981, setting up a trade show for Automatic Testing Equipment. They left their job in the early evening before it had been completed and without obtaining permission from their employer and, when they reported for work at 6:00 A.M. the next morning, were discharged, together with three other employees who had left with them the previous evening. The penalty of one of the five employees was reduced to a one-week suspension because he had been working on Saturday for three hours longer than plaintiffs. Plaintiffs allege that they were discriminated against because they have sided with union dissidents who were plaintiffs in *Crowley* v. *Local No. 82,* C.A. No. 80-2680-K, in which Judge Keeton ordered a new election and which is currently pending before the Court of Appeals, and because they aggravated management by efforts to improve working conditions. They allege that their union representatives failed to investigate and argue their grievance conscientiously before the Joint Grievance Committee, which, after hearing, upheld the discharges.

The applicable law has been well established since *Hines* v. *Anchor Motor Freight, Inc.*, 1976, 424 U.S. 554. Using the standards therein stated, we find that plaintiffs have failed to raise genuine issues of material fact with respect to the union's representing them fairly in handling their grievance. Plaintiffs have suggested a motive for their union's acting arbitrarily or using less than its best efforts on their behalf; but they have offered insufficient evidence of conduct or omissions to support an inference of the union's breach of its statutory duty.

The essence of plaintiffs' claims is a boot-strapping contention that their discharges were so clearly in violation of the collective bargaining agreement that anyone disagreeing with their interpretation of that agreement must be guilty of bad faith. The union's secretary-treasurer, who

argued the case before the Joint Grievance Committee, and the committee rejected plaintiffs' interpretation. The court may now be added to the list. The controlling part of the contract, Article 26, section 3, provides, "Employees who are assigned work during the standard workweek which involves overtime work, shall complete all such work assignments unless excused by the Employer." No clause regarding completion of work assignments unless excused by the employer refers to work performed on weekends or holidays. However, the same section does provide, "All work performed on Saturday, Sunday or a holiday shall be compensated for at time and one-half the straight-time rate of pay with a guarantee of four (4) hours. Overtime is a required condition of employment and shall not exceed 1:00 A.M. unless mutually agreed upon...." The committee upheld their discharges on the basis of their having left the job before completion of work assigned. In our view, the committee's reaching this conclusion is no evidence of arbitrariness or bias against the plaintiffs. A reasonable interpretation of the quoted language is that plaintiffs were required to stay on the job, unless excused, until 1:00 A.M.

Similarly, the refusal of the union representative to urge plaintiffs' interpretation of the contract upon the Committee does not, in our opinion, indicate a violation of the union's duty of fair representation. The union presented a variety of arguments on plaintiffs' behalf. Plaintiff John Early read a prepared statement of his own in which he urged the Committee to adopt his interpretation. The union representative did not in any way undercut the position advanced by the plaintiffs. In some minor respects the union secretary-treasurer, defendant Griffiths, did not carry out every one of the plaintiffs' requests previous to the hearing before the Committee; but these matters do not add up, in our opinion, to a genuine issue of bad faith or arbitrariness or bias on Griffiths' part. We believe that Griffiths' conduct was plainly "within the range of accep-

table performance by a collective-bargaining agent" or union grievance representative. *Hines* v. *Anchor Motor Freight, Inc., supra* at 568. It is undisputed that he cross-examined employer witnesses and addressed each of the employer's contentions. He introduced evidence on behalf of the plaintiffs and objected to certain employer evidence. It is well settled that, if acting honestly and in good faith, a union may prosecute only grievances which it believes to be meritorious. *Vaca* v. *Sipes,* 1967, 386 U.S. 171, 191-92. Surely the union has no less discretion in urging upon a Joint Grievance Committee only those contentions which it believes to be meritorious, especially when it arranges for the union member to himself advance whatever arguments he chooses. See *Findley* v. *Jones Motor Freight, Division Allegheny Corp.*, 3 Cir. 1981,639 F. 2d 953; *Mangiaguerra* v. *D&L Transport, Inc.*, N.D. Ill. 1976, 410 F.Supp. 1022.

Plaintiffs have also argued before us that their discharges violated Article 8, section 3, which provides, "Except in cases where just cause for discharge exists, the Employer will give at least one (1) warning notice of the specific complaint against such employee in writing, with a copy of the same to the union and the shop steward." The previous section, section 2, furnishes a non-exclusive definition of just cause for discharge. It is uncontested that plaintiffs were given no warning in this case that leaving the job before completion while working on a weekend would be grounds for their discharge. Moreover, the Joint Grievance Committee did not find explicitly that there was just cause for their discharge; rather the Committee's decision was simply that the discharges were upheld. However, we consider the distinction to be only semantical. The Committee could not have upheld the discharges unless it found they were for just cause.[1] The Committee was under

[1]Plaintiffs also argued that the union representative on the committee violated their duty of fair representation by failing to adopt plaintiffs' interpretation of the contract and to deadlock the committee and thereby assure the next contractual step of arbitration. Their argument finds support in two law review articles but not in any relevant precedents.

no obligation to file a memorandum of its decision. Arbitrators have no obligation to the court to give their reasons for an award. *United Steel Workers of America* v. *Enterprise Wheel & Car Corp.*, 1960, 363 U.S. 593, 598. If anything, a joint committee would have less of an obligation, sitting as it does at a less formal stage of the grievance procedure.

Lastly, it may be noted that at the conclusion of the hearing before the Committee plaintiffs and the other two employees who had also been discharged were asked by the presiding officer if they felt that they had been properly represented by the union and if they were satisfied that they had had an opportunity to submit all relevant evidence. Plaintiffs and the others answered that they were satisfied and had been properly represented. We think they were. This is the basic reason for our ordering that summary judgement be entered for the defendants.

/s/ W. Arthur Garrity, Jr.
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1217

JOHN EARLY, et al.

Plaintiffs, Appellants,

v.

EASTERN TRANSFER, et al.,

Defendants, Appellees.

Appeal from the United States District Court for the District of Massachusetts.

Before Davis*, Campbell and Bownes, *Circuit Judges.*

February 1, 1983

CAMPBELL, *Circuit Judge.* John and Stephen Early, father and son, brought this suit in the district court under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, against their former employer, their union, and two of the union's officers. Asserting breaches of the duty of fair representation by the union and of the collective bargaining agreement by the employer, they challenged a joint committee decision upholding their discharges, and demanded damages, reinstatement, back pay, and attorney's fees. On cross-motions for summary judgement, the district court found there had been no breach of the duty of fair representation and accordingly entered judgement for all defendants.

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*Of the Federal Circuit, sitting by designation.

The two Earlys, as employees of Eastern Transfer, were working at the Hynes Auditorium in Boston on Saturday, June 6, 1981, setting up a trade show. They left their job in the early evening without express permission of their employer and without completing their assignments. When they reported for work the next morning at 6:00 a.m., they and three other employees who had left with them were discharged. On the day of the discharge, union and company officials met informally, apparently pursuant to steps one and two of the grievance procedure set out in the collective bargaining agreement. The company reduced one employee's penalty to a one-week suspension, but let the discharges of the other four stand. The discharged employees, including the two Earlys, thereupon filed formal grievances.

On July 23, 1981, the grievances were heard by a four-member joint committee.[1] Defendant George Harris, the president of the union local, sat on the committee, and defendant Bart Griffiths represented the grievants. Griffiths made various arguments on their behalf, but did not present that considered by the appellants to be the most compelling, *viz.* that under the collective bargaining agreement employees could leave unfinished work without permission on weekends. John Early made this argument, among others, when reading from a prepared statement; Stephen Early also made a statement on his own behalf. At the close of the hearing, the grievants were asked whether they felt they had been properly represented. All responded affirmatively. The committee upheld the discharges. It did not give any reasons for doing so.

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[1] The collective bargaining agreement provides that grievances not settled by steps one and two are to be heard by a joint committee consisting of equal numbers of union and employer representatives, with the latter from firms other than the employer against whom the grievance is filed. If the committee deadlocks, the matter proceeds to arbitration; otherwise, the committee's decision is "final and binding on the parties."

Before the district court, the Earlys contended that Griffiths investigated and argued their grievances perfunctorily, and that the joint committee's decision was tainted by Harris's bias.[2] The district court ruled that plaintiffs in their affidavits and other supporting materials had failed to raise genuine issues of material fact with respect to the union's fair handling of their grievances. While conceding that plaintiffs may have suggested a motive for their union's acting arbitrarily or using less than its best efforts on their behalf, the court concluded that they "offered insufficient evidence of conduct or omissions to support an inference of the union's breach of its statutory duty." The court also rejected any theory that union members on the joint committee owed a duty to deadlock the committee and thereby trigger the next contractual step of arbitration.

In reviewing the district court's grant of summary judgement, we look at the record in the light most favorable to the opposing party and indulge all inferences favorable to that party. *Hahn* v. *Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). We will uphold the district court if there exists no genuine issue of material fact and the appellees are entitled to judgement as a matter of law. *Condon* v. *Local 2944, United Steelworkers of America*, 683 F.2d 590, 594 (1st Cir. 1982). We conclude that the lower court did not err.

To have a right to contest the merits of their discharge in court, the Earlys must first show that the union violated its duty of fair representation; otherwise the decision of the joint committee is "final and binding." *Hines* v. *Anchor*

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[2] The other union representative on the committee was Stephen Cullen, from the Eastern Conference of Teamsters. Appellants do not suggest any prior hostile dealings with Cullen, although in their affidavits they complain that he took open exception at the hearing to their construction of the contract.

Motor Freight, Inc., 424 U.S. 554 (1976).[3] This exception to the finality rule is narrow. *Sear* v. *Cadillac Automobile Co. of Boston*, 654 F.2d 4, 7 (1st Cir. 1981). "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca* v. *Sipes,* 386 U.S. 171, 190 (1967). "A union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." *Id.* at 191. However, the fact that the grievance was meritorous does not establish a breach of the duty of fair representation or entitle the grievant to escape the bar of finality imposed by the collective bargaining agreement, for "[t]he grievance process cannot be expected to be error-free." *Hines* v. *Anchor Motor Frieght, Inc.*, 424 U.S. at 571. There must be a separate showing of a union breach that "seriously undermined the integrity of the arbitral process." *Id.* at 567. Mere negligence of the union does not amount to such a breach. *Condon* v. *Local* 2944, 683 F.2d at 594-95. Looking at the materials submitted by the parties in the light most favorable to appellants, we believe that appellants did not make a sufficient showing that the union's treatment of these grievances lay outside "the range of acceptable performance by a collective bargaining agent." *Hines,* 424 U.S. at 568.

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[3] We disagree with appellants insofar as they contend that an employee may ordinarily secure judicial review of the merits of a decision by a joint committee, as opposed to an arbitrator, even if the union did not violate its duty of fair representation. *Hines* itself was a petition for review of a joint committee decision. The Supreme Court treated breach of the duty of fair representation as a prerequisite to review, just as it would be where the challenged decision was made by an arbitrator. *See also United Parcel Service Inc.* v. *Mitchell,* 451 U.S. 56,62 (1981) (showing of breach of duty of fair representation "the indispensable prerequisite" to a section 301 action to set aside joint panel award). A joint committee is the grievance mechanism chosen by the parties in their contract; it is to such voluntarily selected machinery that they must normally look for resolution of disputes. Of course, if the committee itself were tainted by dishonesty or similar impropriety, the situation would be different. *See* Part IIA, *infra.*

I. *Adequacy of Representation*

The Earlys contend that Griffiths was hostile to them and failed to investigate and present their case adequately. We consider in turn each of these charges.

A. Hostility

The Earlys' affidavits indicate that they were actively associated with the dissident Teamsters for a Democratic Union, had openly distributed TDU literature, had spoken out at union meetings against policies and practices espoused by Harris and Griffiths, and had declined to testify for the two in separate litigation brought by members of the local against its officers. While Griffiths denied any hostility, pointing out that the union had supported the appellants in several prior grievances, the Earlys' submissions, viewed most favorably, created an issue of fact at least as to whether Griffiths had reason to be hostile to them. That they also created a triable issue of actual hostility is less clear. Griffiths was not alleged ever to have expressed hostility towards the Earlys.[4] *See Melendy* v. *United States Postal Service,* 589 F.2d 256, 259 & n. 3 (7th Cir.) (upholding grant of summary judgment for defendents), *cert. denied,* 436 U.S. 927 (1978). But even assuming, without deciding, that animosity on Griffith's part could be inferred from the Earlys' provocations, this would not, standing alone, establish a breach of the duty of fair representation. *E.g., Freeman* v. *O'Neal Steel,*

[4] The Earlys put forth as evidence of Griffiths's hostility a list drawn up by Griffiths containing 28 names, including that of John Early. Griffiths stated in his deposition that he had been asked to determine the eligibility for union office of this group prior to the November 1980 nomination meeting. The list also included the names of the incumbent officers. We do not see that this evidences actual hostility towards John Early.

Inc., 609 F.2d 1123, 1127 (5th Cir.), *cert. denied*, 449 U.S 833 (1980); *Hardee* v. *North Carolina Allstate Services, Inc.*, 537 F2d 1255, 1258 (4th Cir. 1976). To establish such a breach it must be shown that his handling of the grievances was itself materially deficient. We now turn to that issue.

B. Investigation of the Grievances

The Earlys assert that the materials they submitted demonstrate that Griffiths's investigation was perfunctory and undertaken in bad faith. They say that in conversations with them he voiced disbelief in the merits of their claim and suggested they lie rather than assert allegedly sound defenses, and that he did nothing to prepare their case. The undisputed facts establish, however, that Griffiths spoke with the grievants and company officials on the day of discharge (he was at Eastern Transfer at 6:00 a.m. to do so) and discussed the case with John Early on at least two occasions thereafter. The case was not factually complex: the Earlys did not specify in their affidavits any positive facts of significance which a more thorough investigation would have brought to light. Griffiths arranged that the time cards, which Early had unsuccessfully sought himself, be brought to the hearing, where he and Early examined them and introduced them into evidence.[5]

[5] While the Earlys complain that Griffiths should have obtained these before the hearing, so that other employees who left earlier could be identified and possibly called as witnesses, there is nothing to suggest that the time cards did, in fact, contain any useful leads. If the cards had revealed the names of favorable witnesses, the Earlys and their counsel could certainly have discovered this by the time of the district court proceedings, and named such witnesses and described their expected testimony in a supporting affidavit. At the hearing before the joint committee, Mr. Epstein, the employer's representative, said that two men had left early, but that both had completed their assignments and received permission. Griffiths stated in his deposition that John Early told him that others who left early would not back the grievants but instead would say they had permission to leave. Griffiths also deposed, without contradiction, that Early had told him he would talk to his fellow employees and obtain witnesses.

John Early asserted that he had had trouble reaching Griffiths, who had not returned his phone calls. But in the absence of some specific indication of why further consultations were needed or how they could have helped, we can find no genuine issue concerning unfair representation due to inadequate investigation. *See Findley* v. *Jones Motor Freight, Inc.*, 639 F.2d 953,959 (3d Cir. 1981) (reversing jury's finding that union breached its duty).

C. Presentation to the Committee

According to appellants, at the hearing Griffiths presented only four out of their eleven arguments, and even these were presented halfheartedly. Nonetheless, it is undisputed that Griffiths argued that other employees had walked off the job the same day without permission and had not been fired; that employees had walked off other jobs without permission and had not been fired; that company agents had been present when the grievants left and did not fire them; that John Early had been sick when he left work; and that it had been discriminatory to fire grievants when the fifth employee had only been suspended for the same offense. He also objected to the introduction of certain evidence, questioned company witnesses, and allowed the grievants to make their own statements. This is more than a perfunctory performance. *Cf. Milstead* v. *Teamsters Local 957,* 580 F.2d 232 (6th Cir. 1978) (handling of grievance was perfunctory where union representative before joint committee was unaware of critical fact in support of grievant's claim). Something more than claims of the absence of forensic skill, or a lackluster performance, are required to create a material issue of fact concerning unfair representation. "The union representative is not a lawyer and he cannot be expected to function as one." *Freeman* v. *O'Neal Steel, Inc.*, 609 F.2d

at 1127. Insofar as appears, all the relevant facts and arguments concerning the grievances were placed before the committee.

Appellants' primary objection seems to be that Griffiths did not argue that under the collective bargaining agreement employees could walk off the job on weekends at any time, at least after having done a reasonable amount of work, without permission. The union did not share this interpretation; the district court rejected it; and we also see little support for it in the language of the contract.[6] Griffiths was entitled to decline to put forward an interpretation of the collective bargaining agreement which he and his union reasonably believed was incorrect. *See Findley* v. *Jones Motor Freight, Inc.*, 639 F.2d at 960; *Cannon* v. *Consolidated Freightways Corp.*, 524 F.2d 290, 294 (7th Cir. 1975). Especially was such a position supportable where John Early himself could and did make this argument to the committee.

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[6] The argument runs as follows. The agreement provides that "[e]mployees who are assigned work during the standard work week which involves overtime work, shall complete all such work assignments unless excused by the Employer." As the "standard work week" is defined as Monday through Friday, this language could support a negative inference that overtime work on Saturday need *not* be completed.

However, the agreement goes on to provide that "[a]ll work performed on Saturday, Sunday or a holiday shall be compensated for at time and one-half the straight-time rate of pay with a guarantee of four (4) hours. Overtime is a required condition of employment and shall not exceed 1:00 a.m. unless mutually agreed upon. . . ." While employees can indicate a preference not to work overtime on a Saturday, they may nonetheless be assigned to do such work if needed. Appellants' interpretation would lead to the anomalous result that although overtime is required and although an employee is apparently guaranteed four hours of pay, he could leave whenever he wished. Furthermore, not only could the employer not make an employee stay after 1:00 a.m., it could not make him stay *until* 1:00 a.m. either. It seems most likely that the requirement of completing assignments was spelled out only with regard to the standard work week not because the requirement applied only then but because that was the only time during which it might have been thought that the requirement did not apply.

Appellants' claim of inadequate representation is further weakened by other undisputed facts. First, at the conclusion of the hearing they expressly stated that they had been properly represented. *See Hardee* v. *North Carolina Allstate Services, Inc.*, 537 F.2d at 1259. Second, Griffiths had processed four other grievances for one or both Earlys, apparently without incident or allegations of mishandling. Third, to sustain appellants, it would be necessary to believe that Griffiths was willing deliberately to sacrifice the other two grievants in order to give vent to his hostility towards the Earlys.

If unfair representation could be made out simply by plaintiffs' after-the-fact generalities, almost any grievance would become judicially reviewable. We think that the district court properly ruled on this record that plaintiffs had failed to demonstrate the existence of a material issue of fact with regard to whether Griffiths's conduct amounted to unfair representation.

II. *The Joint Committee*

The Earlys also challenge the fairness and legality of the joint committee proceeding itself. They charge that Harris, the president of the local who sat on the committee, was biased like Griffiths on account of their prior activities. They also say the union representatives on the joint committee violated their duty of fair representation by failing to support the Earlys' position. Had they done so, they might at least have deadlocked the committee and forced the matter to arbitration. *See* note 1, *supra*. Finally, the Earlys contend that the joint committee's decision was invalid because unaccompanied by a statement of reasons.

A. Harris's Bias

Appellants insist, see below, that judicial deference to a joint committee's decision should not approach that due an arbitrator's. Nonetheless, appellants correctly point out that even an arbitrator's decision will be disregarded by a court on a showing of "fraud or bad faith or demonstrated bias or collusion." *Morris* v. *Werner-Continental, Inc.*, 466 F.2d 1185, 1190 (6th Cir. 1972) (stating that this standard applies to arbitrators and joint committees alike), *cert. denied*, 411 U.S. 965 (1973). Similarly, they say, joint committee decisions should at least be ignored if shown to be tainted by fraud, bad faith or bias. *See Loveless* v. *Eastern Air Lines, Inc.*, 681 F.2d 1272, 1275, 1278 n.12 (11th Cir. 1982); *Herman Brothers, Inc.* v. *NLRB*, 658 F.2d 201, 207 (3d Cir. 1981); *Harris* v. *Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971); *Bielski* v. *Eastern Automobile Forwarding Co.*, 396 F.2d 32 (3d Cir. 1968).

On the above reasoning, the Earlys claim to have made a sufficient showing of Harris's personal bias to warrant a trial concerning the fairness of the joint committee proceeding. We disagree.

The critical weakness in this contention is the Earlys' failure to have raised the issue of Harris's purported bias before the joint committee. In the absence of exceptional circumstances, we will not entertain a claim of personal bias where it could have been but was not raised at the hearing to which it applies. This is the accepted rule in arbitration cases. *See Amalgamated Meat Cutters* v. *Cross Brothers Meat Packers, Inc.*, 518 F. 2d 1113, 1121 & n.19 (3d Cir. 1975); *Morris* v. *Werner-Continental, Inc.*, 466 F.2d. at 1189; *Cook Industries, Inc.*, v. *C. Itoh & Co.*, 449 F.2d 106, 107-08 (2d Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); *Graphic Arts International Union* v. *Haddon Craftsmen, Inc.*, 489 F. Supp. 1088, 1093 (M.D. Pa.

1979). Harris had sat on the committees that heard the Earlys' earlier grievances. All the facts now argued as to Harris's alleged bias were known to the Earlys at the time the joint committee heard their grievances. Had the Earlys objected, Harris might have withdrawn in favor of some other union official. While it may be unpleasant to have to choose between possibly alienating a decisionmaker in advance by objecting and waiving the issue of bias, we cannot accept that parties have a right to keep two strings to their bow — to seek victory before the tribunal and then, having lost, seek to overturn it for bias never before claimed.

The Third Circuit recently considered almost the same problem in *United Steelworkers of America* v. *Union Railroad Co.*, 648 F.2d 905 (3d Cir. 1981). There a discharged employee had his grievance taken before a Public Board composed of a union member, an employer representative, and a neutral. The Board upheld the discharge, and in the aftermath the employee made various assertions of personal hostility between himself and the union representative. The court noted that it might set aside the board's decision if it was shown that these personal conflicts caused the member to act fraudulently or corruptly; but that any objection had been waived by failure to make it initially. "When the reasons supporting an objection are known beforehand, a party may not wait to make an objection to the qualifications of a Board member until after an unfavorable award has been made." *Id.* at 913.[7]

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[7] At oral argument, appellants' counsel referred us to *Kirkland* v. *Arkansas-Best Freight System, Inc.*, 475 F. Supp. 180, 190 (E.D. Ark. 1978), *rev'd in part on other grounds*, 629 F.2d 538 (8th Cir. 1980). Though that case did involve a joint committee, it is factually distinguishable from the present dispute. To the extent the district court's opinion is inconsistent with our own, we respectfully disagree.

To be sure, there might conceivably be cases of fraud so egregious that the failure of an employee to object should be overlooked. It was not shown that this is such a case, however. The commitee's decision was reasonable on its face. Appellants have done little more than suggest reasons why the union officials might be hostile to them — they have pointed to no actions or remarks by Harris showing overt hostility or a less than conscientious performance of duty. Indeed, the Early's affidavits suggest that it was Cullen's attitude, rather than Harris's, that they feared.[8]

On this record, in the absence of a timely objection, we see no basis for proceeding with the Earlys' claim that Harris's bias allows the court to look behind the joint committee's award. *See generally Stanton* v. *Delta Air Lines, Inc.*, 669 F.2d 833, 837-38 (1st Cir. 1982).

B. Unfair Representation by Harris as a Member of the Joint Committee

The Earlys and amicus, Teamsters for a Democratic Union, also assert that Harris, as president of the local, owed them a duty to see that their grievance went to arbitration. Arbitration was the next stage of the contract grievance procedure, but would be reached only if the committee were to deadlock.

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[8] Stephen Early's affidavit states:

> Someone from the committee asked if we felt Local 82 had properly represented us. We all said "yes." I said, "yes," because I felt if I said "no" it would alienate the 2 Union committee members, Cullen and Harris. I was particularly sensitive about alienating Mr. Cullen, because he had made a statement which was damaging to my case and therefore seemed to me to be already somewhat against me.

Cullen's statement was apparently one in which he disagreed with the Earlys' construction of the contract. For reasons already given in discussing Griffiths, we see no impropriety in this position by union officials.

The Earlys would have us regard a joint committee proceeding not as the functional equivalent of an arbitration, but as a sort of screening mechanism designed to decide what cases should go to arbitration. They point out that a joint committee's composition makes it susceptible to abuses, such as collusion between employer and union representatives, in cases where the grievants are unpopular with the union's majority or its officialdom. A few courts and commentators have expressed similar concerns, which we do not say are frivolous. *See Barrentine* v. *Arkansas-Best Freight System, Inc.*, 615 F.2d 1194 (8th Cir. 1980), *reversed on other grounds,* 450 U.S. 728 (1981); *General Drivers* v. *Young & Hay Transportation Co.*, 522 F.2d 562, 567 n.5 (8th Cir. 1975); Azoff, *Joint Committee Arbitration,* 47 Tul. L. Rev. 325, 327-29, 336 (1973); Clark, *The Duty of Fair Representation: A Theoretical Structure,* 51 Tex. L. Rev. 1119, 1169-71 (1973); Feller, *A General Theory of the Collective Bargaining Agreement,* 61 Cal. L. Rev. 663, 836-38 (1973).

The Earlys and amicus analogize the union officials on the committee to union business agents deciding whether to send a grievance to arbitration. They do not say the union representatives must deadlock in *every* instance, any more than a business agent must send a meritless case to arbitration. *See Vaca* v. *Sipes,* 386 U.S. at 191. But they seem to argue that the union's duty of fair representation requires its representatives on the joint committee to resolve all doubts in favor of the grievant and arbitration. *But see Teamsters Local Union No. 30* v. *Helms Express, Inc.*, 591 F.2d 211 (3rd Cir.) (union members of joint committee owe grievant no duty of fair representation), *cert. denied,* 444 U.S. 837 (1979); *Larry* v. *Penn Truck Aids, Inc.*, 94 F.R.D. 708 (E.D. Pa. 1982) (same).

Appellants' approach would alter the character of the joint committee from that contemplated in the collective bargaining agreement. The committee would become

largely an alternative mechanism for deciding whether to bring a grievance to arbitration. Yet under the collective bargaining agreement, which is the controlling document, a joint committee decision is to be "final and binding." Absent a genuine deadlock, we believe the parties intended the committee to be a substitute for, and not simply a precursor of, abritration. The Supreme Court has consistently treated the decisions of joint committees and of abritrators indentically. *See, e.g., United Parcel Service, Inc.* v. *Mitchell,* 451 U.S. 56 (1981); *Barrentine* v. *Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1981); *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554; *Humphrey* v. *Moore,* 375 U.S. 335 (1964); *General Drivers* v. *Riss & Co.,* 372 U.S. 517 (1963). Without any indication from either the Supreme Court or the collective bargaining agreement that a joint commitee is to be perceived differently from an arbitrator, we cannot impose a duty of partiality on the members of such an adjudicatory body. Members of a joint committee, like arbitrators, must decide each case honestly and conscientiously on its merits. *See Chicago Cartage Co.* v. *Teamsters,* 659 F.2d 825 (7th Cir. 1981). On the record before us, we cannot say that the union representatives' vote against the Earlys raises a triable issue as to some breach of the duty of fair representation.

C. Written Reasons

Appellants and amicus urge that joint committees be required to give written reasons for their decisions. Emphasizing the secrecy that veils joint committee proceedings, they claim that without written explanations it may be impossible to evaluate the legitimacy of the decision or to detect bias. For support, they point to a law review article[9] and to a recent Eighth Circuit decision,

[9] Azoff, *Joint Committee Arbitration,* 47 Tul. L. Rev. 325 (1973).

Harvill v. *Roadway Express, Inc.*, 640 F.2d 167 (8th Cir. 1981). According to appellants, a failure to provide a statement of reasons should give "rise to a rebuttable inference... that the undisclosed reasoning does not necessarily support its conclusions."

The problem in *Harvill,* however, was more the need for parties and courts to be able to understand the substance of an award than to understand the logic behind it. There the award itself was ambiguous. We also note that, by dismissing the complaint, the *Harvill* court upheld the joint committee's decision despite its failure to give reasons. Other than the dicta in *Harvill,* the cases provide no support for appellants' position. Nor does the collective bargaining agreement, which, in theory, embodies the complete agreement of the parties, including the union and its members. Arbitrators need not give reasons. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960); *Virgin Islands Nursing Association* v. *Schneider,* 668 F.2d 221, 223-24 (3d Cir. 1981). Without any indication from Congress or the Supreme Court that joint committees are subject to special rules in this regard, we see no legal basis for insisting that joint committees provide written reasons for their decisions.

Affirmed.

APPENDIX C

MOVING AND STORAGE AGREEMENT

Between

EASTERN TRANSFER, INC.
and
FURNITURE AND PIANO MOVING DRIVERS, HELPERS, WAREHOUSEMEN AND PACKERS, TEAMSTERS LOCAL UNION NO. 82.

April 1, 1979
to
March 31, 1982

ARTICLE 7

Grievance Procedure

Section 1. A grievance is hereby jointly defined to be any controversy, complaint, misunderstanding, or dispute between the parties to this Agreement relating to wages, hours or other conditions of employment. Any grievance arising between the Employer and the Union or an employee represented by the Union shall be settled in the following manner:

Step 1. The aggrieved employee or employees must present the grievance to the shop steward within three (3) working days after he has knowledge of the grievance, or three (3) working days after returning to home terminal. If a satisfactory settlement is not effected with the foreman within three (3) working days, the shop steward and employee shall submit such grievance in writing to the Union's business representative, with a copy to the Employer.

Step 2. The business representative shall then take the matter up with a representative of the Company with

authority to act upon such grievance. A decision must be made within five (5) working days.

Step 3. The Union and the Employer's Committee (as those terms are defined in the Preamble of this Agreement) shall jointly establish a Joint Grievance Committee to be known as the Union and Employer Committee (hereinafter referred to as the "Joint Committee"). Any panel of the Joint Committee hearing a case shall consist of a minimum of three (3) representatives from the Union (one may be a representative of the Eastern Conference of Teamsters) and three (3) representatives of the Employer's Committee, unless otherwise mutually agreed, but at all times shall consist of an equal number of designated representatives of the Employer's Committee and the Union. It shall be the function of the Joint Committee or a panel thereof to settle disputes and grievances which cannot be settled in accordance with Steps 1 and 2 of this Article. The Joint Committee shall meet regularly and shall at its first meeting formulate Rules of Procedure to govern the conduct of its proceedings. All meeting of the Joint Committee must be attended by each member of such Joint Committee or his alternate, but the absence of any member or alternate shall not invalidate the action of the Joint Committee or a panel thereof. A decision by a majority of any panel of the Joint Committee shall be final and binding on the parties and employees involved. Failure of either party involved to comply with any final decision or to submit to the jurisdiciton of the Joint Committee shall give the other party the immediate right to all legal and economic recourse.

When a Joint Committee is unable to agree to come to a decision on a case, such grievance shall then be taken up as provided in Step 4.

The Joint Committee shall have the right to investigate all facts pertaining to the dispute. The Joint Committee, as well as the Union's business agents, shall, upon each dispute or grievance processed in accordance with this Ar-

ticle, have the right to examine time sheets and any other records pertaining to the computation of compensation of any individuals whose pay is in dispute. Both parties shall be entitled to present such evidence and witnesses in support of their position as they see fit.

Step 4. If no satisfactory settlement can be agreed upon, the parties shall elect a mutually agreeable and impartial arbitrator within (5) days after disagreement. In the event they are unable to so agree, the matter shall be referred to the Federal Mediation and Conciliation Service the next day. After the Service submits a list of arbitrators to the Union and the Employer, they shall reply with their preferred selections no later than three (3) days after receipt of such list. The expense of the arbitrator selected or appointed shall be borne equally by the Employer and the Union.

Section 2. The arbitrator shall not have the authority to amend or modify this Agreement or establish new terms or conditions under this Agreement. The arbitrator shall determine any question of arbitrability.

Section 3. Both parties agree to accept the decision of the arbitrator as final and binding. If the Company fails to comply with the award of the arbitrator or with the procedures of this Article as enforced by a final order of a court of competent jurisdiciton, the Union has a right to take all legal and economic action to enforce compliance.

Section 4. Notwithstanding anything herein contained, it is agreed that in the event the Employer is delinquent at the end of a period in the payment of his contribution to the Teamster Joint Council No. 10 Health and Welfare Fund or the New England Teamsters and Trucking Industry Pension Fund, created under this Agreement, in accordance with the rules and regulations of the Trustees of such funds, after the proper official of the Union has given seventy-two (72) hours' notice, excluding Saturdays, Sundays and holidays, to the Employer of such delinquency in Health and Welfare or Pension payments, the

employees or their representatives shall have the right to take such action as may be necessary until such delinquent payments are made.

Section 5. Any shop steward shall be permitted to leave his or her work to investigate and adjust the grievance of any employee within his jurisdiction, after notifying and receiving permission from his supervisor. Such permission shall not be unreasonably withheld. Employees shall have the shop steward or a representative of the Union present during the discussion of any grievance with representatives of the Employer.

No. 82-2024

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In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN EARLY AND STEPHEN EARLY,
PETITIONERS,

v.

EASTERN TRANSFER AND FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN AND PACKERS, TEAMSTERS LOCAL 82, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR EASTERN TRANSFER IN OPPOSITION

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I.

QUESTION PRESENTED

Does a local union representative who sits on a joint union-employer grievance committee whose decisions are final and binding under the terms of a collective bargaining agreement owe grievants appearing before the committee a duty of partiality?

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BRIEF FOR EASTERN TRANSFER IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals (Pet. App. B-1 to B-15) is reported at 699 F.2d 552. The memorandum opinion and order of the District Court (Pet. App. A-1 to A-5) is not officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 1, 1983. Justice Brennan granted an extension of time within which to file the petition to June 11, 1983, and the petition was timely filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

Statement of Facts

John and Stephen Early, as employees of Eastern Transfer, were working at Hynes Auditorium on Saturday, June 6, 1981, setting up a trade show. At approximately 8:30 p.m., they left their job without the express permission[1] of their employer and without completing their assignment. When they reported for work the next morning at 6:00 a.m., they and three other employees who had left with them were discharged. Representatives of Teamsters Local 82, who were present at 6:00 a.m., met informally with Company officials to review the discharge. The Company reduced the penalty of one employee to a suspension because he had been working for three hours longer than plaintiffs.

The four discharged employees, including the Earlys, filed formal grievances. The grievances were heard by a four-member joint committee.[2] The Union representatives to the

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[1] As Petitioners would readily acknowledge, an alleged factual dispute is not an appropriate basis for seeking certiorari. Accordingly, while the employer does not agree with certain statements of alleged fact set forth by Petitioners, the employer will not note herein each such difference. One point should be mentioned, however. Petitioners continue to claim the lower courts' finding that they left work without permission is unsupportable. This claim is totally lacking in merit. Petitioners never claimed to have the employer's express permission to leave work.

[2] The collective bargaining agreement provides that grievances not settled by steps one and two are to be heard by a joint committee consisting of equal numbers of union and employer representatives, with the latter from firms other than the employer against whom the grievance is filed. The joint committee's decision is "final and binding on the parties". Only if the committee deadlocks does the matter proceed to arbitration.

joint committee[3] were Respondent George Harris, president of Local 82, and Stephen Cullen, from the Eastern Conference of Teamsters.[4] Respondent Bart Griffiths, business agent of Local 82, represented the grievants. Griffiths argued that other employees had walked off the job the same day without permission and had not been fired; that employer representatives had been present when the grievants left and did not fire them; that John Early had been sick when he left work; and that it had been discriminatory to fire grievants when the fifth employee had only been suspended for the same offense. He objected to the introduction of certain evidence, questioned Company witnesses, and allowed the grievants to make their own statements. Griffiths refused to make the argument considered by the Earlys to be most compelling, namely, that under the collective bargaining agreement, employees could leave unfinished work without permission on weekends.[5] John Early made this argument, among others, when reading from a prepared statement; Stephen Early also made a statement on his own behalf. At the close of the hearing, the grievants acknowledged they had been properly represented and were satisified that all relevant evidence was submitted to the joint committee. The joint committee upheld the discharges.[6]

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[3] The identical panel which heard this discharge grievance had heard each of four previous grievances filed by John Early. Petitioners *never* expressed any concern about Harris' impartiality at any time before the joint committee issued its decision upholding their discharges.

[4] Neither Cullen nor the Eastern Conference of Teamsters is a party to this litigation. The Eastern Conference is not a party to the collective bargaining agreement with the employer.

[5] In the proceedings before the district court, Petitioners conceded that their *entire* case was dependent upon their view that under the provisions of the collective bargaining agreement, employees could leave work early without permission on weekends. This construction of the collective bargaining agreement has been rejected by the joint committee, the district court and the court of appeals.

[6] The written decision upholding the discharges was signed by all four members of the joint committee.

Decisions Below

Petitioners filed a complaint in the United States District Court for the District of Massachusetts alleging that they had been discharged by Respondent Eastern Transfer in violation of the collective bargaining agreement and that Respondent Local 82 had failed to properly represent them by failing to investigate the grievance, prepare for the hearing, and presenting no case to the joint committee other then reading their grievances. They alleged that Respondent Local No. 82 failed to properly represent them because of John Early's failure to appear and testify on behalf of the Union in *Crowley* v. *Local 82*, 521 F. Supp. 614 (D. Mass., 1981) and because of their expression of support for the plaintiffs in that case.

The district court found that the Earlys had "failed to raise genuine issues of material fact with respect to the Union's representing them fairly in handling their grievance". (App. A-2). The district court rejected the Earlys' contention that their discharges were so clearly in violation of the contract that anyone disagreeing with their interpretation of the contract must be guilty of bad faith. While stating that Petitioners may have suggested a motive for their union's using less than its best efforts on their behalf, the court concluded that they "offered insufficient evidence of conduct or omissions to support an inference of the Union's breach of its statutory duty". (App. A-2). The court also rejected any theory that Union members on the joint committee owed a duty to deadlock the committee and thereby trigger the next contractual step of arbitration. (App. A-4).

The court of appeals affirmed. The court found that Respondent Griffiths had adequately investigated and presented the plaintiffs' grievances to the joint committee.[7] The court further found that plaintiffs waived their right to

[7] In their Petition, Petitioners acknowledge that, "standing alone, the propriety of this ruling would [not] be worthy of review by this Court". (Petition for Writ of Certiorari, page 7.)

claim that Harris' bias allowed the court to look behind the joint committee's award because plaintiffs failed to raise the issue of bias in a timely fashion. Finally, the court rejected plaintiffs' argument that Harris, as president of the Local, owed them a duty to deadlock the committee and, thereby, see that their grievance went to arbitration, finding such an "approach would alter the character of the joint committee from that contemplated in the collective bargaining agreement". (App. B-13.)

Reasons for Denying the Writ

In analyzing the nature of the question which Petitioners seek this Court to consider, it is appropriate to state at the outset those aspects of the decision below of which Petitioners do not seek review. Petitioners are not seeking review of the lower court's finding that Respondent Griffiths adequately investigated and presented their grievances to the joint committee. Nor are Petitioners seeking review of the lower court's finding that they waived their right to claim that Harris' bias allowed the court to look behind the joint committee's award because they failed to raise the issue of his purported bias before the joint committee.

Stripped of the very essence of their contentions before the courts below, Petitioners seek to have this Court address an abstract question of law and adopt a *per se* rule, divorced from any evidentiary considerations, requiring union members of joint committees to deadlock those committees by voting in favor of individual grievants who appear before the committee except in perhaps the case of the most frivolous of grievances. In so doing, Petitioners have misconstrued the nature of the joint committee system and the role it plays in the federal labor scheme. Moreover, Petitioners' claim finds absolutely no support in the case law. For these reasons, as will be set forth more particularly herein, Petitioners have failed to demon-

strate adequate grounds under Rule 17 of the Supreme Court rules for granting their petition for certiorari.[8]

Section 203(d) of the Labor Management Relations Act states, "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement". Thus, federal labor policy does not favor arbitration *per se* but rather the means selected by the parties for final adjustment of their disputes. Where the parties agree that a joint committee procedure[9] shall provide a conclusive resolution of their differences, federal labor policy can be effectuated only if this procedure is given full play. *United Steelworkers of America* v. *American Manufacturing Company*, 363 U.S. 564 (1960).

Recognizing the strong federal labor policy supporting the means chosen by the parties for finally resolving their disputes, this Court has consistently and unequivocally accorded joint committee awards the same weight as arbitration awards. See, e.g., *United Parcel Service* v. *Mitchell*, 451 U.S. 56 (1981); *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *General Drivers* v. *Riss & Co.*, 372 U.S. 517 (1963). The court below correctly followed this *overwhelming* body of precedent in

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[8] The decision of the court below is not in conflict with the decision of any other federal court of appeals or state court of last resort. The decision below is not in conflict with any applicable decisions of this Court. Finally, the instant case does not involve an "*important* question of federal law which has *not* been, but should be, settled by this Court". (Emphasis added.)

[9] Justice Aldisert of the Third Circuit Court of Appeals called the joint labor-management committee "a mature and enlightened method to resolve industrial disputes". He went further, stating, "These institutions implement the national labor policy mandated by Congress and will be given maximum respect by the courts". *Teamsters Local Union No. 30* v. *Helms Express, Inc.*, 591 F.2d 211 (3rd Cir., 1979).

concluding that the local Union representative to the joint committee owed no duty of *partiality* to the petitioners.[10]

Notwithstanding the foregoing, Petitioners argue that denial of a Teamster's grievance by a joint labor-management decision is akin to a decision by the union not to arbitrate a grievance. Such an argument is wholly lacking in merit. Absent the joint committee structure, a decision not to arbitrate would deprive a grievant of any hearing on his or her grievance. However, the grievants herein received a *full and fair hearing* before the joint committee. During the course of this hearing, Respondent Griffiths presented evidence and arguments on behalf of the grievants. He questioned Company witnesses and objected to the introduction of certain evidence. Griffiths and John Early reviewed Company records brought to the hearing pursuant to Griffiths' request. Moreover, the grievants were allowed to make their own presentations to the joint committee. Finally, and most significantly, had the joint committee rendered an award in favor of the grievants, said award would have been enforceable in federal court to the same extent as any arbitration award. *General Drivers* v. *Riss & Co., supra.*

Moreover, as the court below correctly concluded, the entire nature and purpose of the joint committee system would be irreparably undermined if the union members to such com-

[10] Unable to find any support for their position in relevant case law, Petitioners rely primarily on two law review articles and an isolated quote from the decision of the Eighth Circuit Court of Appeals in *I. H. Whitehouse & Sons* v. *Local Union 214*, 621 F.2d 294, 299 (8th Cir., 1980). Both of these law review articles were published three (3) years before this Court's decision in *Hines* v. *Anchor Motor Freight, supra*. Moreover, while these law review articles and quote from *Whitehouse* v. *Local 214* speak in terms of "collusive secret agreements" and "horsetrading", Petitioners did not present even a single piece of evidence from which any inference of "collusion" or "horsetrading" could be drawn. In this regard, it is particularly noteworthy that petitioners' own former counsel, in oral argument before the court below, conceded that Petitioners' conduct in leaving their job without express permission may have justified imposition of suspensions although not the discharges upheld by the joint committee.

mittees were held to owe a duty of *partiality* to the individual grievants who came before that committee. If such a duty were found to exist, union members on such committees would have little choice but to rubber-stamp the grievant's position except perhaps in the case of utterly frivolous grievances. In such circumstances, if the employer members of the committee, who owe no concomitant duty of partiality to the employer, were to find in favor of the grievant, the employer would be faced with an adverse award enforceable in federal court. Alternatively, were the employer members of the committee to find against the grievant, the committee would end up always deadlocked.[11] This is not what the employer bargained for, in good faith, when agreeing to be bound by joint committee awards.

Any broad finding by this Court that union members to a joint committee owed a duty of partiality to grievants appearing before said committee would result, in essence, in this Court's rewriting the collective bargaining agreements which call for joint committees. Such a result would serve as a death knell to the joint committee system. No employer could agree to a system where half the tribunal considering the grievance owed a duty of partiality to the grievants. If nearly two million Teamster members desire to rid themselves of the joint committee system, it is respectfully submitted that this result should come about through the collective bargaining process and not via judicial fiat.

Finally, contrary to Petitioners' assertion, the courts have not refused to scrutinize the critical conduct of union members to joint committees. As the court below recognized, joint committee decisions will be disregarded if shown to be tainted by fraud, bad faith, or bias. (App. B-10). See e.g., *Morris* v.

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[11] Under many Teamster collective bargaining agreements, the parties are left to economic recourse in the event of a joint committee deadlock.

Werner-Continental, Inc., 486 F.2d 1185, 1190 (6th Cir., 1972). Inasmuch as the joint committee decision herein was not tainted by fraud, bad faith, or bias, the decision of the joint committee denying Petitioners' grievances is final and binding as the collective bargaining agreement says it is.

Conclusion

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 82-2024

IN THE

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OCTOBER TERM, 1982

JOHN EARLY and STEPHEN EARLY,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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RESPONDENTS LOCAL UNION 82, BART GRIFFITHS' AND GEORGE HARRIS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. Facts

Petitioners, John and Stephen Early, were employees of Respondent, Eastern Transfer, and members of Respondent Furniture Movers Local Union 82.[1] On June 6, 1981, Petitioners left their work positions before completing their jobs and without obtaining permission from their employer. (A-2, B-2)[2] When they reported to work

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[1] Petitioners were plaintiffs below, while Respondents here were defendants.

[2] All references are to the Appendix attached to the Petition for a Writ of Certiorari, unless otherwise noted.

the next morning, they were discharged, along with three other employees who had also left their job assignments the previous evening without their employer's permission. (A-2, B-2) On the day of the discharge, officials of Local 82 and Eastern Transfer met informally, pursuant to steps one and two of the grievance procedure contained in the collective bargaining agreement between the union and employer. (B-2) The penalty of one of the five discharged employees was reduced to a one-week suspension because, on the day of his discharge, he had worked for three hours longer than had the Petitioners. (A-2) The company refused to modify its decision to discharge the four other employees. These employees, including the Petitioners, filed formal grievances with Local 82, pursuant to the procedure set forth in the collective bargaining agreement. (B-2)

According to that agreement, these grievances were heard by a four member joint labor-management committee.[3] (B-2) The two Union representatives were Respondent George Harris, then President of Local Union 82, and Stephen Cullen, at that time an employee of the Eastern Conference of Teamsters. (B-2, B-3 n.2) Respondent Bart Griffiths, Secretary-Treasurer of Local 82, represented the Petitioners before the joint committee and both lower courts found that he fulfilled his obligation to Petitioners as their bargaining representative. (A-3-4, B-5-9)[4] Griffiths did not present every argument requested by the

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[3] The collective bargaining agreement provided that grievances not settled by informal meetings between representatives of the Union and the Company were to be heard by a joint committee consisting of equal members of union and employer representatives, with the latter from firms other than the employer against whom the grievance was filed. If the committee deadlocked, the matter proceeded to arbitration; otherwise, the committee's decision was "final and binding on the parties." (B-2 n.1; C-1-4)

[4] Petitioners do not challenge those findings in their Petition. (Pet. at 7) Their assertion that Griffiths put forth a "relatively weak defense" (Pet. at 5) is not supported by the record.

Petitioners, including their contention that the collective bargaining agreement permitted employees to leave work without permission on the weekends. However, John Early presented this argument, among others, in reading a prepared statement. (A-3, B-2) Stephen Early also addressed the joint committee in his own behalf. (B-2) At the conclusion of the hearing, Petitioners stated that they believed the Union had properly represented them and that they had been provided the opportunity to submit all relevant evidence. (B-2) The joint committee upheld the discharges. (A-3, B-2)

B. The Decisions Below

Petitioners filed suit in the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1336, and 29 U.S.C. §§ 157, 159, 185(a) and 412. They alleged that they had been discharged in violation of the collective bargaining agreement and that the Union had breached its duty of fair representation in processing their grievance. (A-1, B-1) Specifically, Petitioners asserted that Griffiths failed to properly represent them in presenting the grievance and that Harris, as a member of the joint grievance committee, had breached his duty to them by refusing to deadlock the case and send it to arbitration.

The district court granted all Respondents' motions for summary judgment and dismissed the action. (A-1) The court found that Petitioners failed to raise genuine issues of material fact regarding the representation provided by the Union in processing their grievance. (A-2)

The district court found the essence of Petitioners' claims to be their assertion that their interpretation of the collective bargaining agreement was so clearly correct that anyone disagreeing with that interpretation must be guilty of bad faith. (A-2) Yet the district court joined

Griffiths, Harris, Cullen and the joint grievance committee in rejecting Petitioners' contract interpretation. (A-3)[5]

The district court further found that Petitioners had not presented any evidence that the joint committee was arbitrary or biased. (A-3) The Petition misconstrues this aspect of the district court's decision. (*See*, Pet. at 6) The district court rejected Petitioners' contention that the union representatives on the joint grievance committee owed them a duty "to deadlock the committee and thereby assure the next contractual step of arbitration." (A-4 n.1) However, the court did not, as the Petitioners suggest, find that the union representatives had no obligation to avoid acting in an arbitrary or biased manner in considering the grievance. Rather, the district court held the committee to the standard utilized in reviewing decisions of third-party arbitrators, and concluded that the committee's decision was not evidence of its bias or arbitrariness, as Petitioners had alleged. (A-3)

The Court of Appeals for the First Circuit affirmed the district court's decision. That court held that Griffiths' conduct in preparing and presenting the grievance did not violate his duty of fair representation. (B-5-9) With regard to the joint committee's decision, the circuit court refused to impose a duty of partiality on the members of the joint committee. (B-14) It rejected Petitioners' assertion that the union representatives on the committee were analogous to a business agent deciding whether to send a case to arbitration. (B-13) The circuit court held that adoption of Petitioners' argument "would alter the character of the joint committee from that contemplated

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[5] At the January 25, 1982 hearing on Respondents' motions for summary judgment, the district court agreed with Respondents' interpretation of the relevant provision of the collective bargaining agreement, noting "I don't consider that this requirement of completing work assignments applies only in the week [as Petitioners had alleged]. Of course it applies on the weekend. I don't think it is close."

in the collective bargaining agreement" and erode its ability to render "final and binding" decisions as desired by the parties. (B-13-14) The court did not find any personal bias on the part of Harris. (B-10-12)[6] Finally, the court found no legal basis for insisting that joint committees provide written reasons for their decisions. (B-14-15)

REASONS FOR DENYING THE WRIT

Petitioners have characterized their Petition as raising an issue never considered by this Court. (Pet. at 9) In fact, however, the issue presented in this case is merely a restatement of the question initially considered by this Court in *Driver's Union* v. *Riss & Co.*, 372 U.S. 517 (1963); specifically, the status of a decision rendered by a joint grievance commitee. The Court's position in *Riss* equating a joint committee's decision with that of a third party arbitrator was affirmed in *Humphrey* v. *Moore*, 375 U.S. 335 (1964), and has been consistently followed by this Court on every occasion it has had to consider the matter. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728 (1981); *United Parcel Service* v. *Mitchell*, 451 U.S. 56 (1981); *DelCostello* v. *Teamsters*, 51 U.S.L.W. 4693 (U.S. June 8, 1983). This Court's position has been consistently followed, without criticism or dissent, by the circuit courts.[7]

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[6] Petitioners quibble with the circuit court's resolution of their assertion that Harris was biased against them, but do not challenge that factual finding before this Court. (Pet. at 8 n. 4)

[7] *E.g.*, *Teamsters Freight Employees* v. *Bowling Green Exp., Inc.*, 707 F.2d 254 (6th Cir. 1983); *Chicago Cartage Co.* v. *IBT*, 659 F.2d 825 (7th Cir. 1981); *Bell* v. *IML Freight, Inc.*, 589 F.2d 502 (10th Cir. 1979); *Teamsters Local Union No. 30* v. *Helms Express, Inc.*, 591 F.2d 211 (3d Cir.), *cert. denied*, 444 U.S. 837 (1979); *Walters* v. *Roadway Express, Inc.*, 557 F.2d 521 (5th Cir. 1977); *Warren* v. *IBT*, 544 F.2d 334 (8th Cir. 1976); *Local Freight Drivers Local 208* v. *Braswell Motor Freight*, 422 F.2d 109 (9th Cir.), *cert. denied*, 400 U.S. 827 (1970).

The question actually presented by the Petition is whether this Court should reverse its holding in *Riss* that a decision renderd by a contractually created joint grievance committee is entitled to the same deference as one rendered by an arbitrator, where the parties to the collective bargaining agreement have specified that a committee decision is to be "final and binding." That reversal issue has been before this Court previously, presented in an *amicus* brief filed in support of the petitioner in the *Hines* case.[8] It was rejected there and is no more meritorious here.

To change the manner in which joint committee decisions are treated by a reviewing court in the fashion suggested by Petitioners would deprive that grievance-resolution process of the finality envisioned by the contracting parties and transform it into a mere conduit on the way to third-party arbitration or economic warfare. And while Petitioners would have this Court believe that the joint grievance procedure is unique to the Teamsters Union and its affiliates, other unions and employers have contractually provided for the resolution of disputes in this manner. *See, e.g., Parks* v. *Int'l Bro. of Electrical Wkrs.*, 314 F.2d 886, 894 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963). Were the Court to adopt Petitioners' position, it would abandon its longstanding, and correct, interpretation of the national labor policy as embodied in Section 203(d) of the National Labor Relations Act.[9]

Thus, the traditional criteria for this Court to grant a writ of certiorari are simply not present here.

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[8] *See, amicus* brief filed on behalf of PROD, Inc., et al. by Arthur L. Fox II, counsel to Petitioners in the instant case.

[9] Section 203(d), 29 U.S.C. § 173(d), provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

A. The Decisions Below Do Not Conflict With the Decisions of This Court

This Court has clearly established that the decisions of a joint grievance committee consisting of equal number of union and employer representatives are entitled to the same respect as the awards of neutral arbitrators. In *Drivers Union* v. *Riss & Co.*, 372 U.S. 517, this Court unanimously rejected the Sixth Circuit's determination that a joint committee decision was not the equivalent of an arbitration award and held that such an award, if intended to be "final and binding," was enforceable under § 301 of the Labor-Management Relations Act of 1947. This Court stated:

> If, as petitioners allege, the award of the Joint Area Cartage Committee is under the collective bargaining agreement final and binding, the District Court has jurisdiction under § 301 to enforce it . . . . It is not enough that the word 'arbitration' does not appear in the collective bargaining agreement, for we have held that the policy of the Labor Act 'can be effectuated only if the means chosen by the parties for the settlement of their differences under a collective bargaining agreement is given full play' . . . . Thus, if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement, it is enforceable under § 301. And if the Joint Area Cartage Committee's award is thus enforceable, it is of course not open to the courts to reweigh the merits of the grievance. (372 U.S. at 519, citations omitted)

Shortly after *Riss*, this Court affirmed that a joint grievance committee was the equivalent of third party arbitration, if such was the intent of the contracting parties. In *Humphrey* v. *Moore*, 375 U.S. 335, the Court applied criteria traditionally utilized to review the propriety of an arbitrator's decision in determining that a joint committee had not exceeded its authority under the contract to resolve a seniority dispute. 375 U.S. at 347-48, 351. The Court implicitly rejected concurring Justice

Goldberg's argument that the joint committee, unlike an arbitrator, had authority to amend and modify the collective bargaining agreement. 375 U.S. at 353-55.[10]

In *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 557, this Court referred to a contractually created joint grievance committee as an "arbitration committee." In *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728, 734, 737, the joint committee procedure was termed "arbitration" and its rulings "arbitral decision[s]." In both *United Parcel Service* v. *Mitchell*[11] and *DelCostello* v. *Teamsters*[12] this Court considered the joint committee process to be the equivalent of third party arbitration.

Thus, the decisions below are entirely consistent with the prior holdings of this Court. Petitioners' assertion that this Court has not had the opportunity to consider whether joint grievance committees should be considered the equivalent of third party arbitrators is so patently incorrect as to be frivolous. (*See*, Pet. at 9) There exists no conflict with prior decisions of this Court to justify a grant of the Petition for a Writ of Certiorari in this case.

B. The Decisions Below Do Not Conflict With Holdings of any Circuit Court of Appeals

There is no conflict among the circuit courts of appeal which have addressed the character of joint committee awards. The circuits have routinely followed the principles first articulated by this Court in *Riss* and have consistently held that the awards of joint labor-management committees are reviewable under the same standards as are awards of neutral arbitrators.

It would unnecessarily belabor the point to analyze each of the circuit court decisions which has affirmed

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[10] This Court has referred to the grievance panel in *Humphrey* v. *Moore* as a "joint arbitration committee" in subsequent cases. *E.g.*, *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. at 565.

[11] 451 U.S. 56.

[12] 51 U.S.L.W. 4693 (U.S. June 8, 1983).

this principle. Some of them have been noted previously in footnote 7. *See*, p. 5, *supra*. Yet Petitioners cite isolated dicta in several decisions which have suggested that the joint committee procedure is susceptible to misuse. (Pet. at 13)[13] Neither those comments nor those of the president of the American Arbitration Association[14] provide cause for this case to be reviewed by this Court. Moreover, neither the record of this case nor other published sources have been cited to support the Petitioners' allegations of misuse of the joint committee process.

In short, the decisions of the lower courts in this case are entirely consistent with those of other circuit courts of appeal and reflect the prevailing view that the joint committee procedure is a suitable substitute for third-party arbitration, if such is the intent of the contractual parties.

C. Acceptance of the Petitioners' Theory Would Be Contrary to the Federal Labor Policy

This Court recognized, in *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 355 (1974), that the federal courts' proper role under § 301 of the NLRA is to fashion the federal law of collective bargaining "from the policy of our national labor laws." The federal labor policy concerning dispute resolution procedures embodied in collective bargaining agreements is set forth in § 203(d) of the Act, 29 U.S.C. § 173(d):

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[13] Of course, the same can, and has, been said of the arbitration process. *E.g.*, Hays, *Labor-Arbitration—A Dissenting View* (1966), p. 61. Indeed, there are those who have even suggested that the judicial process is not infallible. Frankfurter & Greene, *The Labor Injunction* (1932).

[14] Pet. at 10 n. 8. It is hardly surprising that the American Arbitration Association is not enthralled with a procedure which saves the parties from the expenses related to third-party arbitration, with the consequent adverse impact on the earnings of the practitioners of that occupation.

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Thus, this Court has held that courts have a limited role in reviewing arbitration awards rendered under the terms of a collective bargaining agreement, noting "that the federal policy of settling labor disputes by arbitration would be undermined if the courts had the final say on the merits of the award." *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 596 (1960).

As previously noted, the deference paid to the intent of the parties as expressed in the collective bargaining agreement has been extended to joint grievance committees by the *Riss* decision and its progeny. In *United Mine Workers Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 576 (1982), this Court reaffirmed that the judiciary is without authority to modify the substantive terms of a collective bargaining agreement "when neither the collective bargaining process nor its end product violates any command of Congress. . . ."

Yet adoption of Petitioners' position would set aside the method agreed upon by the parties to settle grievances arising under the collective agreement, despite the fact that said procedure is consistent with the federal labor policy. The contract at issue in this case specifically provided that "a decision by a majority of any panel of the Joint Committee shall be final and binding on the parties and employees involved." (C-2) Petitioners would have that language judicially modified to require union representatives to prevent a grievance from being finally resolved by the joint committee, if the committee's decision were adverse to the employee grievant. It is clear from the contract's terms that it was obviously not the intent of the parties to have the union representative on the joint committee act as an advocate for

the grievant in order to ensure arbitration of every claim.[15] Indeed, as Chief Justice Burger has noted, contractual parties often intentionally adopt joint committee procedures in order to *avoid* the costly and time consuming process of having grievances resolved by third parties, rather than by "shop stewards, business agents, managerial supervisors, and the traditional ad hoc panels of fact finders." *Barrentine* v. *Arkansas-Best Freight, Inc.*, 450 U.S. at 747, 48 (Burger, dissenting).

Lower courts have also recognized that a union representative on a joint grievance committee has a responsibility, vested in him by the collective bargaining agreement, to resolve a grievance in the manner agreed to by the parties. *Difini* v. *Spector Freight Systems*, 101 L.R.R.M. 3055, 3058 (E.D.N.Y. 1979). The role assigned the union representative on a joint grievance panel is that of an arbitrator, not an advocate. This Court has recognized the duty owed by a representative on a benefit trust fund to that fund transcends his responsibilities to the interests of the party that appointed him. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 334 (1981). That principle also must be applied to joint grievance committee representatives if that procedure for resolving industrial disputes is to have continued validity.

Acceptance of that proposition does not, as Petitioners assert, leave the individual grievant unprotected from the irresponsible actions of panel members. It is well-established that members of a joint arbitration committee are bound by the same standards as are neutral arbi-

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[15] It should be noted that not every grievance procedure provides for arbitration in the event the joint committee deadlocks. Many, if not most, permit the parties to resort to the economic weapons available. *See, e.g., Local Freight Drivers Local 208* v. *Braswell Motor Freight*, 422 F.2d at 113. Thus, adoption of Petitioners' standards, although leading to arbitration in this case, could force unions to resort to their economic weapons to enforce the demands of member-grievants in a majority of cases.

trators.[16] *Morris* v. *Werner-Continental, Inc.*, 466 F.2d 1185, 1190-91 (6th Cir. 1972), *cert. denied*, 411 U.S. 965 (1973). Accordingly, a joint committee's decision will not be upheld if it involves "fraud or bad faith or demonstrated bias or collusion." *Id.* at 1190-91. Thus, there is no basis for Petitioners' claim that the joint grievance committee procedure is beyond the scope of judicial review. (Pet. at 10, 12)[17]

Thus, the Petition does not present a significant federal question involving public policy concerns warranting the attention of this Court. Indeed, adoption of Petitioners' position would be detrimental to the declared federal labor policy favoring grievance resolution by means determined by the parties to a collective agreement.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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[16] Petitioners apparently recognized this fact in drafting their complaint since paragraph 27 alleges that the union representatives on the joint committee "were unlawfully biased or partial, guilty of misconduct, exceeded their powers under the contract, and disregarded the terms of said contract . . . ."

[17] Indeed, both *Hines* and *Barrentine* involved reviews of joint committee decisions.

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No. 82-2024

In The

Supreme Court of the United States

October Term, 1982

JOHN EARLY and STEPHEN EARLY,

Petitioners,

v.

EASTERN TRANSFER, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN AND PACKERS, TEAMSTERS LOCAL 82, BART GRIFFITHS AND GEORGE HARRIS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners wish to address one argument made by respondents in their briefs filed in opposition to the petition. Both the Teamsters Union and Eastern Transfer allege that petitioners are asking the Court to rewrite their contract by imposing a "duty of partiality" on union members of joint committees to deadlock grievances. Teamster Br. at 10-11; Eastern Br. at 7-8. To create alarm, the company claims that this result "would serve as a death knell to the joint committee system." Eastern Br. at 8. However, respondents' claims

are little more than a "straw horse" because, quite simply, they are *not* what petitioners advocate.[1]

All petitioners ask is that this Court rule that its holding in *Vaca v. Sipes*, 386 U.S. 171 (1967), includes those Teamsters officials who in reality determine whether an employee's grievance will be submitted to impartial arbitration. These officials happen to be the ones who sit on the bipartite committees, not the ones who appear with the grievant and help present his claim to the committee.

Contrary to respondents' claims, were the duty of fair representation to attach to the conduct of union committeemen, it would not oblige them to advocate, nor to vote to sustain and thus to submit to arbitration, every employee's grievance. As the Court made clear in *Vaca*, the duty of fair representation contemplates that unions will have discretion whether to invoke arbitration and whether to settle or even abandon frivolous grievances short of that most costly and time-consuming step in the grievance procedure. 386 U.S. at 191-92. The Court reasoned that if the rule were otherwise, and individual employees were able to compel arbitration, the grievance process would be seriously overburdened. Accordingly, it held that "a union does not breach its duty of fair representation . . . merely because it settled the grievance short of arbitration." *Id.* at 192.

The Teamsters Union points out that joint committee decisions are already subject to being set aside on the traditional grounds for vacating arbitral awards, *i.e.*, where the arbitrator exceeded the scope of his authority, or where there was evident partiality, fraud, or collusion. Teamster Br. at 12. While this is true, the Court recognized in *Vaca* that the availability

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[1] Both respondents also assert that in a long line of decisions this court has accorded the same respect to joint committee awards, as to impartial arbitral decisions. Teamster Br. at 5; Eastern Br. at 6. However, as petitioners explained in their petition (p. 13, n.9), the issue presented here concerning the duty owed by union committee members to individual workers has never before been considered by the Court.

of these grounds was not sufficient "to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." 386 U.S. at 182. Accordingly, the Court gave individual workers an additional ground for having arbitral awards vacated, namely whenever they could demonstrate that their union breached its duty of fair representation when processing, or refusing to process, their grievances. Thus, whenever an employee can demonstrate that his union acted arbitrarily, discriminatorily or in bad faith, when handling his grievance, he is entitled to a judicial hearing on his breach of contract claim under section 301 of the Labor Management Relations Act. 29 U.S.C. § 185. It is this additional ground that has been effectively withheld from Teamster members by virtue of the unique structure and operation of the joint grievance committee.

If the Court were to rule that the duty of fair representation applies to the Teamster officials sitting as members of joint grievance committees, it would not impose upon those officials a duty any different from the duty imposed upon officials of other unions. Like the Steelworker offical empowered to decide whether to settle grievances or to invoke arbitration, Teamster committee members would have similar discretion provided they exercised it in a manner consistent with the duty of fair representation. Naturally, it is implicit in the union's representative role that it will act as a workplace advocate for its members. But that does not require it to blindly advocate every grievant's position, or to deadlock every grievance before a joint committee and thus to invoke impartial arbitration. Accordinly, there is no basis for respondents' contention that by holding union members of a joint committee to a duty of fair representation the effect would be to modify the grievance procedure in their agreement by causing committees invariably to deadlock.

In *Vaca*, the Court observed that Congress had not intended "to shield employers from the natural consequences of their

breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements." 386 U.S. at 186. Given the current judicial practice of declining to review the conduct of those Teamster officials who exercise discretion over the enforcement process as members of joint committees, both Teamster employers and the Union are, however, effectively shielded from the consequences of their wrongful conduct when they improperly deny grievances. Petitioners seek only to bring themselves and other Teamster members within the same *Vaca* "bulwark" that protects employees represented by other unions.

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